



Briefing Paper 464

October 2018

## Domestic Abuse and Asylum

### 1. Introduction

In July 2018, US Attorney-General Jeff Sessions issued a directive codifying changes in policy with regard to asylum applications. These included instructions that officials adjudicating the claims of asylum seekers should not take into account any claims based on escape from domestic violence or gangsterism.<sup>1</sup> This effectively restricted the grounds for asylum of some of the most vulnerable categories of those seeking protection.

This change of approach raises a number of questions: Is it unusual for countries to entertain asylum applications based on an individual's fear of domestic violence or other 'private crime'? What is the position in Africa, and South Africa in particular? What is the approach of the Church to this issue? And what do human rights advocates say about it? This paper will attempt to answer some of these questions briefly, beginning with a look at how Mr Sessions' decision affects the traditional approach to assessing asylum applications.

### 2. Changing the Grounds for Asylum

The need for protection, especially with a view to assisting vulnerable people to live with dignity and security, has always been a key ground for granting asylum. AG Sessions made the point that the grounds of domestic violence or danger from gangsterism would henceforth be regarded as 'private crimes', as opposed to 'state crimes' such as political or religious oppression, for example. This effectively closes the possibility of protection for those who are not victims of state crimes. Mr Sessions commented that an "asylum statute is not a general hardship statute. The victim has to show that her home government is unwilling or unable to assist her."<sup>2</sup> He clarified that "victims of personal crimes do not fit this definition no matter

how vile and reprehensible the crime perpetrated against them."<sup>3</sup> This marks a major, negative shift in practice, especially for women from Central America who have sought safe haven in the USA from relationships in which they were subject to physical, emotional and sexual abuse.

"The mere fact that a country may have problems effectively policing certain crimes such as domestic violence or gang violence, or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim," according to Mr Sessions.<sup>4</sup> It must be noted that this position reflects the Republican Party position, which holds that "asylum should be limited to cases of political, ethnic or religious persecution."<sup>5</sup> Mr Sessions has set the bar higher by rejecting these grounds at the 'credible fear' stage of proceedings, increasing particularly the threshold standard of proof in 'credible fear' interviews. The directive seeks to deport people who proffer these grounds even before they file for asylum.<sup>6</sup> This would reverse the Obama administration ruling which allowed most immigrants who passed an initial credible fear review to be released into the USA pending a full hearing.<sup>7</sup>

The immediate background to this directive was the case of a domestic violence survivor from El Salvador. Mr Sessions overruled a 2014 precedent that recognized domestic violence as a basis for asylum, and concluded that domestic violence survivors did not face persecution due to their membership of a 'particular social group, which, he maintained, was required to gain asylum in the United States.

Critics argue that the Attorney-General has failed to understand intimate partner violence, mislabelling it as a 'private' matter between a husband and wife that is limited to the domestic sphere. This ignores a simple fact: El Salvador is one of the deadliest places in the world to be a

woman. It has been called the 'murder capital of the world'; and a recent study found that a woman is killed there every 16 hours.<sup>8</sup>

This narrow understanding of grounds for asylum, and the characterisation of private crimes as an obstacle to asylum, is not in line with contemporary jurisprudence. It has always been understood that protection, no matter whether the perpetrator of the violence is a state, state entity, or private actor, is the key ground for considering and granting asylum. To return people to situations of danger and violence contradicts the principle of non-refoulement: that people in need of protection should not be returned to unsafe situations or countries. This in itself goes against the well-established presumption in law not to limit fundamental rights, and it also means that, at the borders of the United States at least, abused women will be deprived of the right to safety and dignity, an inalienable entitlement of every human being.

A great fear in this scenario is that this deviation from the normal practices governing asylum, with its principle of expanding protection, sets a precedent for similar policies in other countries where already there is a hostile environment towards various categories of displaced persons. It is worth noting that what the USA does in such policy areas is often imitated by other countries. South Africa, in particular, needs to be vigilant not to fall into this type of policy rationalisation at the expense of those seeking protection.

### 3. The Human Rights Response

Responding to Mr Sessions' directives, Michelle Lapointe of the Southern Poverty Law Centre said:

"By declaring that the lack of policing of domestic and gang violence in other countries cannot be the sole basis for asylum in the U.S., Sessions is instituting a policy that will block thousands of people from seeking refuge in America. Women and children from other parts of the world who might have been able to get protection under these claims may now be deported to dangerous situations where they could very well lose their lives."<sup>9</sup>

In another response, Prof Karen Musalo of the Centre for Gender and Refugee Studies at the University of California, Hastings, said, "If we say in the year 2018 that a woman has been beaten almost to death in a country that accepts that as almost the norm, and that we as a civilized society

can deny her protection and send her to her death, I don't see this as just an immigration issue ... I see this as a women's rights issue."<sup>10</sup>

The Guardian newspaper quoted Mr Frank Sharry, the founder and executive director of the progressive immigrant rights group, America's Voice, as saying, "Sessions's decision will have a tremendous impact. Women fleeing violent abuse, young people fleeing murderous gangs and cartels, people fleeing terrorist groups, are being told to go to hell and die there."<sup>11</sup>

Other organisations also spoke out against the policy change: "The United Nations High Commission on Refugees had urged Sessions against changing the asylum rules. It warned that such action would violate international agreements the U.S. has entered into concerning refugees and would subject victims to being returned to situations where their lives are in danger. The American Bar Association warned that ending the asylum eligibility for victims of domestic violence 'would further victimize those most in need of protection.'"<sup>12</sup>

### 4. The Church's Position

The Catholic Church in the US criticized Mr Sessions' directive on the theological ground that asylum is an instrument to preserve life.<sup>13</sup> In a statement, the head of the US Bishops' Conference, Cardinal Daniel di Nardo, said:

"These vulnerable women will now face return to the extreme dangers of domestic violence in their home country. This decision negates decades of precedents that have provided protection to women fleeing domestic violence. Unless overturned, the decision will erode the capacity of asylum to save lives, particularly in cases that involve asylum seekers who are persecuted by private actors. [Courts and policymakers should] respect and enhance, not erode, the potential of our asylum system to preserve and protect the right to life."<sup>14</sup>

In a document issued on 18<sup>th</sup> July 2018, a group of various faith communities issued a statement with regard to humane return policies in Europe. They made a point that bears strongly on the processes for returning people to dangerous situations:

"Any return policy has to guarantee the dignity and fundamental rights of the person.

The fundamental principle must be to return in safety and with dignity. The principle of non-refoulement – that people in need of protection cannot be returned to unsafe countries – has to be respected in all procedures and actions.”<sup>15</sup>

The statement expresses deep concern about the growing practice of returning people to conflict-ridden and fragile countries. Forcibly displaced persons must never be returned to unsafe places where their lives are at risk. The organisations ask for monitoring mechanisms to be put in place which can trace returnees and ensure that their safety is guaranteed.<sup>16</sup>

## 5. The Situation in Africa

A World Bank report issued in 2016 states that one third of African women have experienced domestic violence, either physical or sexual. The same report said that 51% of married African women report being beaten by their husbands,<sup>17</sup> and that levels of acceptance of such abuse are as high as 13% in Malawi and 21% in Mozambique. Both countries are regional neighbours of South Africa and some of their citizens who come to the realisation that such behaviour is not acceptable might well look to South Africa, with its well-known progressive gender policies, as a safe haven.

The 2016 SADC Parliamentary Forum reported that in the eastern part of the DRC violence, especially rape, was used as a weapon of war. Those most affected were girls between 10 and 17, with 10% of the victims under the age of 10. It is well within reason to suppose that, as they seek to escape this intolerable burden, the nearest and most logical place to escape to would be South Africa.

A SADC 2016 report speaks of gender-based violence as “an epidemic. Sexual violence is the fastest growing crime regionally and globally, and is one that is least likely to be reported and to result in a conviction.”<sup>18</sup> The report goes on to state that, despite increasing compliance with the 2008 SADC Protocol on Gender and Development, and with continental instruments such as the AU Charter on Human and People’s Rights 2003,<sup>19</sup> the region still exhibits high levels of gender based violence and is unable to make decisive strides towards equality and equity. It is worth noting that the 2003 Instrument forms one of the key standards for the African Peer Review Mechanism

to determine commitment to the protection and promotion of women’s rights in Africa.<sup>20</sup>

The report puts the blame on an inflexible patriarchal approach to traditional practices which downgrades women and sees them as perpetual minors, as well as the vulnerable situation of women in the economic downturn, and odious attitudes to HIV/AIDS.<sup>21</sup> For these reasons there is little compliance with the law, and a low rate of reporting to the police. The report also emphasises that domestic violence is the most prevalent form of gender based violence. In this regard, it notes that traditional patriarchal patterns of socialization add greatly to the acceptance of this situation by many women,<sup>22</sup> and – it might be added – a reluctance on the part of some law enforcement agencies to follow through on complaints.

It is worth noting that, in terms of the 2008 SADC Protocol, all member states were required by 2015 to ensure that legislation was put in place to prohibit all forms of gender based violence, and to ensure that perpetrators were tried by appropriate courts. It also stated that legislation should be in place to support and assist survivors of such violence.<sup>23</sup>

As far back as 2013, studies in Zimbabwe showed that 68% of women in that country had experienced some form of violence. Spokespersons for women’s groups said that “Zimbabwe is falling behind in the fight to eliminate violence against women and girls.”<sup>24</sup> A 2015 report for the same country speaks of a girl below the age of 16 being raped every two hours.<sup>25</sup> It is not beyond the bounds of possibility that women and girl children seeking protection from such forms of domestic violence would cross the border, seeking safety in South Africa.

But South Africa itself has some of the most horrific statistics with regard to the abuse of women. In 2016 the Medical Research Council reported that one in four women is physically abused by an intimate partner or ex-partner, and that every six hours a woman is killed by her partner or ex-partner.<sup>26</sup> This suggests that abuse of women in various forms is in fact endemic in the region. With this in mind it is not only important to strengthen campaigns to eliminate gender based violence in South Africa, but it is also an appropriate time to purposefully establish a policy environment where women from across our borders will find protection in South Africa in their quest to escape the horrors of domestic abuse. As

a matter of principle and solidarity, and as a tribute to the courage of women across this continent in support of oppressed and abused women during the apartheid era, we must ensure that protection is not only guaranteed for South African women, but for all who cross our borders seeking this most fundamental of rights.

## 6. Conclusion

Given the recent policy shifts in the USA, and bearing in mind the influence of that country on policy positions taken by other countries, it is critical to interrogate the consequences of Attorney Generals Sessions' decisions. Crucially,

refugee organisations and activists should be alert to any tendency to narrow down South Africa's reception criteria by excluding so-called 'private crimes' or 'personal crimes' as grounds for seeking asylum. As long as the abuse of women and children remains rife, advocacy efforts should ensure that the victims and survivors are afforded maximum protection, and every effort should be made to bring legislation and policies in line with the finest aspirations towards, and the closest compliance with, the common good.

---

**Peter-John Pearson**  
**Director**

---

<sup>1</sup> <https://www.detroitnews.com/story/news/nation/2018/07/16/immigration-denying-asylum-trump/36922275/>

<sup>2</sup> <https://www.usatoday.com/story/news/politics/2018/06/11/ag-sessions-unveils-strict-asylum-policy-limits-domestic-violence/691978002/>

<sup>3</sup> <https://www.usatoday.com/story/news/politics/2018/06/11/ag-sessions-unveils-strict-asylum-policy-limits-domestic-violence/691978002/>

<sup>4</sup> <https://www.usatoday.com/story/news/politics/2018/06/11/ag-sessions-unveils-strict-asylum-policy-limits-domestic-violence/691978002/>

<sup>5</sup> <https://www.usatoday.com/story/news/politics/2018/06/11/ag-sessions-unveils-strict-asylum-policy-limits-domestic-violence/691978002/>

<sup>6</sup> <https://www.politifact.com/truth-o-meter/statements/2017/oct/19/jeff-sessions/jeff-sessions-claim-about-asylum-system-fraudulent/>

<sup>7</sup> <https://www.politifact.com/truth-o-meter/statements/2017/oct/19/jeff-sessions/jeff-sessions-claim-about-asylum-system-fraudulent/>

<sup>8</sup> <http://prospect.org/blog/tapped/jeff-sessions-does-not-understand-domestic-violence>

<sup>9</sup> <https://www.usatoday.com/story/news/politics/2018/06/11/ag-sessions-unveils-strict-asylum-policy-limits-domestic-violence/691978002/>

<sup>10</sup> <https://www.brit.co/new-immigration-ruling-prohibits-victims-of-domestic-violence-and-gangs-from-seeking-us-asylum/>

<sup>11</sup> <https://www.theguardian.com/us-news/2018/jun/11/trump-asylum-seekers-abuse-gang-violence-end-jeff-sessions>

<sup>12</sup> <http://nymag.com/daily/intelligencer/2018/06/sessions-ends-asylum-for-gang-and-domestic-violence-victims.html>

<sup>13</sup> <https://www.americamagazine.org/politics-society/2018/06/13/catholic-leaders-denounce-sessions-asylum-decision-we-have-truly-lost>

<sup>14</sup> <https://www.americamagazine.org/politics-society/2018/06/13/catholic-leaders-denounce-sessions-asylum-decision-we-have-truly-lost>

<sup>15</sup> [http://jrseurope.org/news\\_detail?TN=NEWS-20180717073118](http://jrseurope.org/news_detail?TN=NEWS-20180717073118)

<sup>16</sup> [http://jrseurope.org/news\\_detail?TN=NEWS-20180717073118](http://jrseurope.org/news_detail?TN=NEWS-20180717073118)

<sup>17</sup> <http://blogs.worldbank.org/african/domestic-violence-and-poverty-in-africa-when-the-husbands-beating-stick-is-like-butter>

<sup>18</sup> [https://www.sadc.int/files/8415/0340/7935/SGDM\\_2016\\_ENGLISH.pdf](https://www.sadc.int/files/8415/0340/7935/SGDM_2016_ENGLISH.pdf)

<sup>19</sup> [https://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](https://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf)

<sup>20</sup> [https://www.sadc.int/files/8415/0340/7935/SGDM\\_2016\\_ENGLISH.pdf](https://www.sadc.int/files/8415/0340/7935/SGDM_2016_ENGLISH.pdf) p57

---

<sup>21</sup> [https://www.sadc.int/files/8415/0340/7935/SGDM\\_2016\\_ENGLISH.pdf](https://www.sadc.int/files/8415/0340/7935/SGDM_2016_ENGLISH.pdf) p62

<sup>22</sup> [https://www.sadc.int/files/8415/0340/7935/SGDM\\_2016\\_ENGLISH.pdf](https://www.sadc.int/files/8415/0340/7935/SGDM_2016_ENGLISH.pdf) p62

<sup>23</sup> [https://www.sadc.int/files/8415/0340/7935/SGDM\\_2016\\_ENGLISH.pdf](https://www.sadc.int/files/8415/0340/7935/SGDM_2016_ENGLISH.pdf) p57

<sup>24</sup> [https://www.zimbabwesituation.com/news/zimsit\\_rising-violence-against-women-girls-in-zimbabwe/](https://www.zimbabwesituation.com/news/zimsit_rising-violence-against-women-girls-in-zimbabwe/)

<sup>25</sup> [https://www.zimbabwesituation.com/news/zimsit\\_w\\_bulawayo24-news-one-girl-raped-every-2-hrs-in-zimbabwe/](https://www.zimbabwesituation.com/news/zimsit_w_bulawayo24-news-one-girl-raped-every-2-hrs-in-zimbabwe/)

<sup>26</sup> <https://city-press.news24.com/News/shocking-stats-on-abuse-of-women-in-sa-20161120>

This Briefing Paper, or parts thereof, may be reproduced with acknowledgement.  
For further information, please contact the CPLO Events and Media Co-ordinator.